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No. 88-887

In the Supreme Court of the United States

OCTOBER TERM, 1988

OSCAR FERNANDO CUEVAS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the evidence was sufficient to support petitioner's conviction on counts charging him with concealment of a material fact, in violation of 18 U.S.C. 1001.

2. Whether the district court abused its discretion in admitting testimony by the government's expert witness.

3. Whether the district court abused its discretion in excluding the proffered testimony of petitioner's expert witness.

4. Whether the court of appeals made factual errors in its opinion and relied on evidence that was not in the record in affirming petitioner's conviction.

5. Whether the evidence was sufficient to sustain petitioner's conviction on counts charging him with failing to file currency transaction reports (CTRs), in violation of 31 U.S.C. 5313.

6. Whether cumulative penalties may be imposed on counts charging conspiracy to possess and distribute cocaine and conspiracy to violate the currency reporting requirements.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Statement	1
Argument	7
Conclusion	14

TABLE OF AUTHORITIES

Cases:

Albernaz v. *United States*, 450 U.S. 333 (1981)	13, 14
Berenyi v. *Immigration Director*, 385 U.S. 630 (1967)	11
Blockburger v. *United States*, 284 U.S. 299 (1932)	7, 13
Houston Oil Co. v. *Goodrich*, 245 U.S. 400 (1918)	11
Southern Power Co. v. *North Carolina Public Service Co.*, 263 U.S. 508 (1924)	11
United States v. *Affleck*, 776 F.2d 1451 (10th Cir. 1985)	10
United States v. *Esch*, 832 F.2d 531 (10th Cir. 1987), cert. denied, No. 87-6280 (Feb. 2, 1988)	10
United States v. *Felak*, 831 F.2d 794 (8th Cir. 1987)	10
United States v. *Johnston*, 268 U.S. 220 (1925)	11
United States v. *London*, 550 F.2d 206 (5th Cir. 1977)	9
United States v. *Mouzin*, 785 F.2d 682 (9th Cir. 1986), cert. denied, 479 U.S. 985 (1986)	13
United States v. *Shannon*, 836 F.2d 1125 (8th Cir. 1988), cert. denied, No. 87-6952 (June 13, 1988)	9
United States v. *Woodward*, 469 U.S. 105 (1985)	8

Constitution, statutes, regulation and rules:

U.S. Const. Amend. V (Double Jeopardy Clause)	7
18 U.S.C. 1001	2, 5, 6, 7, 8, 9
21 U.S.C. 846	2
31 U.S.C. 1058	8
31 U.S.C. 1101	8

Statutes, regulation and rules – Continued: Page

31 U.S.C. 5313 2
31 U.S.C. 5316 2
31 U.S.C. 5316(a)(1)(A) 2
31 U.S.C. 5322(b) 2, 12
31 C.F.R. 103.22(a)(1) 6, 13
Fed. R. Evid. 703 ..... 9, 10
Advisory Committee notes 10

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A33) is reported at 847 F.2d 1417.

JURISDICTION

The judgment of the court of appeals was entered on June 2, 1988. A petition for rehearing was denied on August 30, 1988 (Pet. App. A34-A35). On October 18, 1988, Justice O'Connor extended the time within which to file a petition for a writ of certiorari to and including November 28, 1988, and the petition was filed on that day. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Central District of California, petitioner was con-

victed of conspiracy to aid and abet the possession and distribution of cocaine, in violation of 21 U.S.C. 846 (Count 1); conspiracy to fail to report a transaction involving in excess of $10,000 of United States currency, in violation of 31 U.S.C. 5316 (Count 2); failure to report currency transactions in excess of $100,000 in a 12-month period, in violation of 31 U.S.C. 5313 and 5322(b) (Counts 3 and 4); failure to report the export of more than $5,000 in United States currency, in violation of 31 U.S.C. 5316(a)(1)(A) (Counts 5, 6, 8, 10, 11, 13 and 15); and aiding and abetting the fraudulent concealment, by trick, scheme, and device, of a material fact within the jurisdiction of the United States Customs Service, in violation of 18 U.S.C. 1001 (Counts 7, 9, 12, and 14). Petitioner was sentenced to a total of 15 years' imprisonment: 10 years' imprisonment on Count 1, to be followed by concurrent terms of five years' imprisonment on Counts 2, 3, 4, 5, 7, 9, and 13. On the remaining counts, execution of sentence was suspended in favor of probation. The court of appeals affirmed in a divided opinion. Pet. App. A1-A33.

1. The evidence at trial showed that petitioner operated a money laundering service for cocaine distributors. Petitioner's agents received more than $23 million in proceeds from narcotics dealers in the United States. Those agents transported the currency to petitioner in Switzerland and London, where he deposited the money in foreign banks. Gov't C.A. Br. 7.

In 1983, petitioner induced Brinks International Courier Services to send seven cash shipments from Miami to Switzerland without filing the necessary customs declarations. Petitioner misled Brinks by claiming that the bags contained promissory notes and negotiable instruments. Using the alias "Hector Gomez," petitioner received the shipments in Switzerland. On December 9, 1983, a

customs official opened one of the Brinks bags and found $240,000 in cash. Following that discovery, petitioner promptly abandoned his Zurich and Miami offices and left no forwarding address. Gov't C.A. Br. 2-4.

In December 1983, petitioner leased two offices in Mexico City. From April 1984 to April 1985, petitioner employed couriers who listed the Mexico City offices as their addresses. During that period, the couriers brought millions of dollars from the United States to petitioner in London. Petitioner opened an account at Citibank in London in June 1984. Thereafter, he regularly brought to the bank suitcases containing up to $1 million in small United States bills for deposit. The morning after each deposit, petitioner would wire the money back to United States banks. Petitioner told Citibank officers that the deposited cash came from his family's coffee and sugar business. The officer in charge of petitioner's account, however, had handled more than 100 commodities-related accounts, and none of those accounts had involved large transactions in cash. Because Citibank was suspicious about the source of the funds, it terminated its relationship with petitioner in November 1984. During the five-month period that the account was open, petitioner laundered $19 million in cash through Citibank London. Thereafter, he laundered an additional $4.4 million in currency through Republic National Bank in London. Gov't C.A. Br. 4-7.

On April 8, 1984, British customs officers detained one of petitioner's couriers after finding $177,000 in his suitcase. An unfiled Currency Monetary Instrument Report (CMIR) was attached to the currency. Another courier, Charles Spiteri, made deliveries of $400,000 and $494,000 to petitioner in London in November 1984. On neither occasion did the courier file a CMIR. Petitioner paid Spiteri $400 for each delivery. Another courier, Carlos Guzman,

made 39 trips between Europe and the United States on petitioner's behalf. Guzman was arrested on November 30, 1984, at the Los Angeles airport while attempting to board an international flight with $516,000 in drug-scented cash. Before the cash was discovered, Guzman told a Customs officer that he was carrying only a few hundred dollars in cash. Gov't C.A. Br. 5, 6, 9, 10.

Petitioner regularly purchased the airline tickets for his couriers shortly before their planes were scheduled to depart from Heathrow Airport in London. Using the name "Hector Gomez," he paid for the tickets in cash. Petitioner also paid the couriers' hotel bills and paid for their entertainment while they were in London. Gov't C.A. Br. 6 n.5, 9.

Ernesto Zawadzki was petitioner's primary link between the drug traffickers and the couriers. Zawadzki obtained the drug money from the traffickers and sent the cash to petitioner through petitioner's couriers. Zawadzki telephoned petitioner in London almost every time that he dispatched a courier to petitioner. Zawadzki was arrested with Guzman at the Los Angeles airport on November 30, 1984. Following his arrest, a drug trafficker signaled Zawadzki on the beeper. A DEA agent answered the call and, pursuant to the instructions of the trafficker, picked up a diaper box containing $300,000 in small bills. Thereafter, agents arrested the trafficker and found records of his narcotics business and more than a kilogram of cocaine in his house. Gov't C.A. Br. 7-8.

On the day after Zawadzki's arrest, agents seized more than $1 million in drug-scented cash from Zawadzki's apartment. In an attempt to beat the agents to the cash, petitioner flew on the Concorde supersonic jet from London to New York and then on to Los Angeles. He told Spiteri that he had to retrieve from Zawadzki's apartment

a document worth $1 million that was wanted by the Palestinians. Petitioner alleged that Zawadzki's life was in danger. When petitioner and Spiteri arrived at Zawadzki's building, petitioner asked Spiteri to see if any Palestinians were near the apartment. Spiteri saw several federal agents outside the apartment and reported to petitioner that they did not appear to be Palestinian. Petitioner replied that "these people hire mercenaries to do their jobs, you know"; he and Spiteri then left the building. Spiteri did not see petitioner again.[1] Gov't C.A. Br. 11-13.

Petitioner was arrested on April 11, 1985, in Zurich. The authorities seized from him a phone book containing the beeper numbers used by the narcotics traffickers and an address book containing the names and numbers of petitioner's couriers. The authorities also seized an altered Colombian passport in the name "Hector Gomez" to which petitioner's photograph was affixed. In addition, they seized a number of CMIRs signed by "Hector Gomez." Gov't C.A. Br. 13.

2. The court of appeals affirmed petitioner's conviction. The court first held that the evidence was sufficient to show that Guzman, as a courier for petitioner, failed to file CMIRs for the cash that he transported to London. The court observed that the trial testimony of two witnesses confirmed that a thorough search was conducted for CMIRs under Guzman's name covering the dates on which Guzman exported currency. Pet. App. A9-A10. The court also sustained petitioner's conviction on the counts charging that Guzman had concealed a material fact when he failed to file the required CMIRs, in violation of 18 U.S.C. 1001. The court held that whether or not it was

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[1] The following week, however, petitioner called Spiteri and told Spiteri that Zawadzki was fine and that the people outside Zawadzki's apartment were his friends.

necessary to prove a "trick, scheme, or device" to sustain a concealment conviction under Section 1001, a deceptive scheme was shown here: the court found that Guzman's recurrent failure to file CMIRs, his evasive behavior when detained, his reliance on petitioner for airline tickets, and petitioner's continuing close contacts with Zawadzki, sufficiently demonstrated that both petitioner and Zawadzki were participating in a deceptive scheme to conceal the export of United States currency. Pet. App. A10-A11.

The court of appeals also rejected petitioner's argument that he was not required to file CTRs because the transfers of cash were wholly within his money laundering organization, which he conceded was a "financial institution" as that term is defined in the pertinent regulations. The court noted that even if the transfers were viewed as "merely within [petitioner's] organization, they qualified as transfers 'through' the 'financial institution,' and were thus subject to the reporting requirements of 31 C.F.R. 103.22(a)(1)." Pet. App. A19-A20.

The court held that the district court did not abuse its discretion in allowing Customs agent Marcello to summarize the evidence for the jury and to refer to information within his special knowledge as a DEA and Customs agent. Pet. App. A24. Further, the court held that even if it was error for the agent to rely on hearsay evidence for a portion of his expert opinion, that error did not require reversal because the evidence against petitioner was overwhelming and any possible prejudice was harmless. *Id.* at A25.

The court also sustained the district court's exclusion of the proffered testimony of petitioner's expert witness on the ground that the testimony was confusing and irrelevant. The court observed that the witness proposed to testify only about the currency exchange laws in Colom-

bia. The expert admitted that he knew nothing about the currency laws governing transactions in London, Zurich, or the United States. He also admitted that he had no knowledge pertaining to money laundering and no knowledge of petitioners' activities. Pet. App. A26-A27.

Finally, the court held that the cumulative penalties imposed on the two conspiracy counts did not violate the Double Jeopardy Clause. The narcotics and currency reporting conspiracies were not the same for double jeopardy purposes, because each required "proof of an additional fact which the other does not." Pet. App. A27, quoting *Blockburger* v. *United States*, 284 U.S. 299, 304 (1932). Unlike the narcotics conspiracy, the currency reporting conspiracy required proof of transactions exceeding $10,000 per day or $100,000 per year, and the knowing transportation of currency outside the United States. And although the narcotics conspiracy required proof of an intent to possess or distribute cocaine, the currency reporting conspiracy did not. Pet. App. A27-A28.

Judge Ferguson dissented. In his view, the district court should have permitted petitioner's expert witness to testify.

ARGUMENT

1. The court of appeals correctly rejected petitioner's claim (Pet. 14-19) that the evidence was insufficient to sustain his conviction on the counts charging that he aided and abetted his courier Guzman in concealing the exportation of United States currency by means of a "trick, scheme, or device," in violation of 18 U.S.C. 1001. The evidence showed that Guzman filed the required CMIR only once. The evidence also showed that on two occasions, Guzman lied about complying with the currency

reporting laws. See Gov't C.A. Br. 26-28 n.27. From this fact, the jury could infer that Guzman deliberately concealed the exportation of cash on other occasions and that he was part of a larger money laundering scheme. Moreover, the jury could properly infer from the fact that petitioner had deceived Brinks in 1983 regarding the nature of its cargo that deliberate concealment was a part of petitioner's ongoing scheme. The deliberate concealment continued in 1984 when Guzman made 39 trips to Europe on petitioner's behalf. Petitioner's use of an alias and his payment in cash for the tickets of his couriers are also affirmative acts of deception that he used to facilitate his scheme to conceal the exportation of cash. Gov't C.A. Br. 4-7.

Petitioner's conviction on the Section 1001 counts is consistent with this Court's decision in *United States* v. *Woodward*, 469 U.S. 105 (1985). In *Woodward*, the defendant falsely answered "no" on a form asking whether he was carrying more than $5,000 in currency upon entering the United States. He was convicted of making a false statement, in violation of Section 1001, and of willfully failing to report that he was carrying in excess of $5,000 into the United States, in violation of 31 U.S.C. 1058 and 1101. The only question before the Court was whether the two offenses were the same for double jeopardy purposes. The Court held that they were different because Section 1001 reaches persons who conceal a material fact by any "trick, scheme, or device." 469 U.S. at 108. The Court explained that an individual could violate the currency reporting statute by failing to file the necessary report upon entering the United States even though he was prepared to answer any questions truthfully. But he could not be convicted of concealing a material fact by any "trick, scheme, or device" as long as he intended to answer questions truthfully, if asked.

The evidence in this case showed that Guzman was quite different from the hypothetical traveler in *Woodward*, who was prepared to answer questions truthfully. For the same reason, the decision below does not conflict with the decisions of the Fifth and Eighth Circuits in *United States* v. *London*, 550 F.2d 206 (5th Cir. 1977), and *United States* v. *Shannon*, 836 F.2d 1125 (8th Cir. 1988), cert. denied, No. 87-6952 (June 13, 1988). In *London*, the court held that Section 1001 requires the government to prove "that the material fact was affirmatively concealed by ruse or artifice, by scheme or device." 550 F.2d at 214. In *Shannon*, the court held that "passive acquiescence" is not sufficient to prove a concealment offense under Section 1001. 836 F.2d at 1130.

In this case, the government proved that Guzman and petitioner affirmatively concealed the exportation of cash as part of the scheme in which they were both involved. To advance the scheme the two men committed numerous "affirmative acts," including lying to customs officers, using an alias, and purchasing tickets in cash only minutes before departure. Also, following petitioner's arrest, officers found unfiled CMIR forms filled out in the name "Hector Gomez" and falsely stating that the cash belonged to a Mexican business. Accordingly, neither Guzman nor petitioner passively acquiesced in the failure to disclose the exportation of currency. The evidence therefore satisfied the requirements of *London* and *Shannon*, and clearly distinguished this case from the hypothetical case posited in *Woodward*.

2. Petitioner contends (Pet. 20-25) that the court of appeals erred in holding that Fed. R. Evid. 703 authorized the government's witness, Agent Marcello, to base his export opinion on information that he learned from interviews with Zawadzki. In fact, the court of appeals did not so hold; the court instead simply held that the alleged er-

ror, if any, was harmless in light of the overwhelming evidence of petitioner's guilt. Pet. App. A25. Petitioner does not refute this assessment. Accordingly, he has not shown that a favorable resolution on the merits of this issue would affect the judgment against him.[2]

3. Petitioner contends (Pet. 26-30) that the district court erred in excluding the testimony of Gerald Nickelsburg, whom he called as an expert on South American currency controls. The admissibility of expert testimony is a matter committed to the sound discretion of the district court. *United States* v. *Esch*, 832 F.2d 531, 535 (10th Cir. 1987), cert. denied, No. 87-6280 (Feb. 2, 1988); *United States* v. *Felak*, 831 F.2d 794, 797 (8th Cir. 1987). In this case, there was no abuse of discretion because the proffered testimony was not relevant to the issues at trial. The evidence at trial showed that petitioner orchestrated

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[2] In any event, Fed. R. Evid. 703 specifically permits an expert to base his opinion on evidence that is not introduced at trial. The Rule provides:

> The facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence.

The Advisory Committee Notes confirm that the Rule permits the expert to base his opinions on the statements of individuals who do not testify at trial. In this case, Agent Marcello formed his opinion from a number of sources: his training in the techniques used by those engaged in money laundering, his debriefing of suspects in other cases, his years of experience in the DEA and the Customs Service, the evidence adduced at trial, and his debriefing of Zawadzki. Gov't C.A. Br. 39. Agent Marcello's testimony thus conformed to the Rule, and there was no error. *United States* v. *Affleck*, 776 F.2d 1451, 1458 (10th Cir. 1985) (testimony of government's expert accountant, which was based in part on his interviews with defendant's employees, was admissible).

the flow of drug money from the United States to Europe, through European banks, and back into United States banks. Transfer of currency in and out of South America was not at issue. At voir dire, Nickelsburg admitted that he knew nothing about money laundering and he had no knowledge of petitioner or his business dealings. Gov't C.A. Br. 14. Nickelsburg therefore lacked expertise in the areas relevant to the jury's deliberations.

4. Petitioner alleges (Pet. 31-34) that the court of appeals made three factual errors in its opinion, and that this Court should grant review to correct those errors. It is well settled, however, that this Court does not sit to correct such errors. *United States* v. *Johnston,* 268 U.S. 220, 227 (1925) ("We do not grant * * * certiorari to review evidence and discuss specific facts."); *Southern Power Co.* v. *North Carolina Public Service Co.,* 263 U.S. 508 (1924) (dismissing the writ upon discovering that the dispute involved a question of fact rather than law); *Houston Oil Co.* v. *Goodrich,* 245 U.S. 440 (1918) (same). Cf. *Berenyi* v. *Immigration Director,* 385 U.S. 630, 635 (1967).

In any event, petitioner's allegation of factual errors is meritless. Petitioner first contends that the court of appeals erred in finding that a search was conducted for currency reports filed under Guzman's name. In fact, the evidence at trial showed that such a search was conducted and that Guzman's name was included in the search. Although the witness who conducted the search initially forgot to list Guzman, later in her testimony she acknowledged that she had conducted such a search and that the search had uncovered only one filing mailed by Guzman. Gov't C.A. Br. 26, n. 25, citing Tr. 1040.

Petitioner next complains (Pet. 32) that the court of appeals stated, in its lengthy list of evidence supporting the narcotics conspiracy charge, that petitioner had learned of

"Zawadzki's narcotics arrest"; he contends that the court of appeals had to step outside the record to conclude that petitioner knew Zawadzki's arrest was for narcotics offenses. Pet. App. A16. But this fact may be inferred from evidence showing that immediately after Zawadzki's arrest, petitioner rushed to Los Angeles to retrieve the drug money concealed in Zawadzki's apartment. Knowledge that Zawadzki was charged with narcotics offenses may also be inferred from petitioner's close relationship with Zawadski and from the fact that petitioner's own phone book contained the beeper numbers used by the narcotics traffickers. Gov't C.A. Br. 13.

Finally, although petitioner no longer contests his extradition from Switzerland, he nevertheless complains (Pet. 33-34) that the court of appeals failed to give proper effect to the extradition decree's provision that he was not to be tried for the "fiscal aspects" of his charged activities. In fact, the court carefully analyzed the issue, and found that the Swiss extradition order is best interpreted to permit the prosecution of petitioner "to the full extent of the indictment" (Pet. App. A22, A23), and that the currency transaction charges should be subject to prosecution (Pet. App. A23). Petitioner would read the Swiss order more narrowly, but as the opinion of the court of appeals shows, the broader reading is the more natural one.

5. Petitioner contends (Pet. 35-37) that there is no reporting requirement for a transfer of more than $10,000 within a financial institution and, therefore, his convictions on Counts 3 and 4 cannot stand. Those counts charged that petitioner was in the business of "transmitting funds abroad for others" and that on two specific occasions, his financial institution failed to report the receipt of more than $400,000, in violation of 31 U.S.C. 5322(b). The evidence at trial showed that in these two instances,

Zawadzki collected money from narcotics traffickers and recorded the receipt of the cash in his ledger. He then gave the money to Spiteri in Los Angeles. Spiteri, in turn, transported the cash to petitioner in London. Petitioner then deposited the cash in Republic National Bank. Gov't C.A. Br. 25. Accordingly, these transactions did not take place entirely "within" petitioner's financial institution, as he claims. Rather, the trafficker's deposits passed *through* the institution and were ultimately deposited in a foreign bank. Under the plain terms of the regulations, petitioner was required to report these transactions by filing CTRs. See 31 C.F.R. 103.22(a)(1) ("each financial institution * * * shall file a report of each deposit, withdrawal, exchange of currency or other payment or transfer, by, through, or to such financial institution, which involves a transaction in currency of more than $10,000").[3]

6. Finally, petitioner argues (Pet. 38-39) that the Double Jeopardy Clause bars the imposition of cumulative punishment on the counts charging conspiracy to aid and abet the possession and distribution of cocaine and conspiracy to fail to report currency transactions. Under the *Blockburger* test (284 U.S. at 304), however, these offenses are not the same. Although there is an overlap in the evidence, the two counts charge violations of different conspiracy statutes, and the object of each conspiracy is different. See *Albernaz* v. *United States*, 450 U.S. 333 (1981) (multiple punishment may be imposed for con-

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[3] Contrary to petitioner's claim (Pet. 36), *United States* v. *Mouzin*, 785 F.2d 682, 690-691 (9th Cir. 1986), cert. denied, 479 U.S. 985 (1986), is entirely consistent with the decision below. The court in *Mouzin* concluded that there was insufficient evidence that the defendant there had "received" the currency because the authorship of the ledger and computer printout submitted to prove receipt was not established, so those documents were inadmissible. There was no basis for any similar finding of inadmissibility here.

spiracy to import and conspiracy to distribute marijuana, even where both conspiracies arose from a single agreement). The object of the narcotics conspiracy is to aid and abet the possession and distribution of cocaine, while the object of the currency conspiracy is circumvention of the reporting requirements for transactions over $10,000. Petitioner points to no legislative history indicating that Congress did not intend to authorize cumulative penalties for these offenses. See *id.* at 340-343. Accordingly, he has not rebutted the presumption in favor of cumulative punishment that arises when each offense requires proof of a fact that the other does not. *Ibid.*

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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